141 WHERE IDENTIFICATION OF DEFENDANT IS IN ISSUE

The identification of the defendant is an issue in this case and you should give it your careful attention. You should consider the reliability of any identification made by a witness, whether made in or out of court. You should consider the credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness.

Identification evidence involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification.

Consider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.

You should also consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected or influenced the identification.

In evaluating the identification evidence, you are to consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification. Then give the evidence the weight you believe it should receive.

If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person

who committed the crime.

COMMENT

Wis JI Criminal 141 was originally published in 1971 and revised in 1980, 1987, 1991, 2000, 2005, 2006, 2008, 2012, and 2013. This revision was approved by the Committee in August 2021; it added to the Comment.

The Committee has reviewed this instruction often in recent years, as issues relating to eyewitness identification have received increased attention in the appellate courts. The following offers a helpful summary of the current state of knowledge on eyewitness identification and cites many of the leading articles: Richard A. Wise and Martin A. Safer, "A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony," pp. 6 16, Court Review, Spring 2003.

In 2004, the Committee considered a range of alternatives before publishing a revised instruction in 2005 that, in the Committee's judgment, reflects the best approach. Despite the attention being paid to identification issues, the Committee did not discover a new model instruction that it believed was suitable for adoption in Wisconsin. The 2005 revision borrowed a few sentences from Instruction 3.06, Federal Jury Instructions of the Seventh Circuit (West 1980). [Note: That instruction has been substantially modified in the current 7th Circuit instructions. See No. 308, Pattern Criminal Jury Instructions for the Seventh Circuit (1998).]

The 2005 revision attempts to communicate the principle that the same considerations apply to identification witnesses as to other witnesses but that the identification issue deserves careful attention. Thus, some of the material repeats considerations included in the general credibility instruction. See Wis JI-Criminal 300. Minor additions were made to the text of the instruction in the 2006 revision. Subsequent revisions have added to and reorganized the Comment.

Jury instructions are one part of the response to perceived special problems with eyewitness identification testimony. Wisconsin cases addressing these issues are summarized below. The potential importance of a jury instruction on eyewitness identification, in the context of other safeguards, was recognized by the United States Supreme Court in Perry v. New Hampshire, 565 U.S. 228, 132 S.Ct. 716 (2012). The issue was whether rules regarding pretrial screening of allegedly suggestive identification procedures applied where police were not responsible for the suggestiveness. The court concluded they were not, in part because of the availability of other safeguards:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

The Perry decision includes a reference to specific cautionary jury instructions used in a variety of jurisdictions. [See the decision at footnote 7.]

Wisconsin Cases Citing Wis JI-Criminal 141

Wis JI-Criminal 141 [© 1971] was cited with approval in Chapman v. State, 69 Wis.2d 581, 230

N.W.2d 824 (1975), State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), and Hampton v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979. In all three cases, the Wisconsin Supreme Court upheld the trial court's refusal to give a more detailed identification instruction of the type adopted by several circuits of the United States Court of Appeals under their supervisory powers. See, for example, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) and United States v. Hodges, 515 F.2d 650 (7th Cir. 1975).

In Blackwell v. State, 42 Wis.2d 615, 167 N.W.2d 587 (1969), the court recognized that giving an identification instruction "should be encouraged in narcotics-undercover agent cases" because "there is a stronger possibility of misidentification in narcotics cases where an undercover agent may file as many as 100 arrest warrants upon completion of his term of duty." Blackwell, 42 Wis.2d at 625, citing, Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965).

Also see Johnson v. State, 85 Wis.2d 22, 270 N.W.2d 153 (1978), State v. McGee, 52 Wis.2d 736, 190 N.W.2d 893 (1971), and Johns v. State, 14 Wis.2d 119, 109 N.W.2d 490 (1961).

In State v. Amos, 153 Wis.2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989), the court endorsed Wis JI-Criminal 141 as a correct statement of the law in the context of rejecting the defendant's claim that the trial court erred in refusing to give a requested theory of defense instruction (that someone else committed the crime). On theory of defense instructions generally, see Wis JI-Criminal 700.

The Wisconsin Supreme Court reviewed a trial court's refusal to give the more detailed version of Wis JI-Criminal 141 in State v. Waites, 158 Wis.2d 376, 462 N.W.2d 206 (1990). The court held that ". . . the circuit court did not abuse its discretion by giving the limited version of Wis JI-Criminal 141. The limited version, in combination with other instructions and evidence presented to the jury during the trial, sufficiently focused the jury's attention on the issue of identification." 158 Wis.2d 376, 380. However, the court recommended the use of the more detailed instruction in some cases:

> We recognize the dangers inherent in identification testimony when the identity of the criminal is an important issue in a case. In such an instance, we recommend the use of the more detailed instruction to avoid subsequent challenges to the accuracy of such jury instructions. We do not, however, require that the more detailed instruction be given in all situations where the accuracy of the eyewitness identification is an issue. Such a holding would remove some of the circuit court's discretion in giving instructions. Rather, we conclude that the circuit court should determine whether to give the more detailed instruction, basing its decision on factors such as the significance of the identification issue, the nature of other instructions and the danger of misidentification. This determination is not subject to reversal unless the circuit court abuses its discretion.

158 Wis.2d 376, 383 84.

Wisconsin Cases Considering Eyewitness Identification Issues

In State v. Roberson, 2019 WI 102, 389 Wis.2d 190, 935 N.W.2d 813, the Wisconsin Supreme Court abrogated State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, rejecting its necessity test that applied to the admissibility of show-up identification testimony. The Wisconsin Supreme Court reaffirmed that reliability is the linchpin in determining the admissibility of identification testimony. It held that "Due process does not require the suppression of evidence with sufficient 'indicia of reliability.'" Id. ¶3, citing Perry v. New Hampshire, 565 U.S. 228, 232 (2012). The Wisconsin Supreme Court reaffirmed pre-Dubose case law establishing the following test for the admissibility of eyewitness identification testimony: "A

criminal defendant bears the initial burden of demonstrating that a showup was impermissibly suggestive. If a defendant meets this burden, the State must prove that "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Id. ¶4.

In State v. Shomberg, 2006 WI 9, 288 Wis.2d 1, 709 N.W.2d 370, the Wisconsin Supreme Court addressed the admissibility of expert testimony on matters relating to identification procedures. The court held that it was not error to exclude expert testimony in a trial to the court held in 2002. But the court noted that "in the intervening years, much has been learned about the processes and limitations of memory," pointing to the court's decision in Dubose (now since abrogated as noted above) new guidelines for identification procedures promulgated by the Wisconsin Department of Justice, and the recently enacted "Criminal Justice Reform Act," 2005 Wisconsin Act 60. The court also noted:

> ¶17. Were this case to come before the circuit court today, given the developments that have occurred in the interim, it is highly likely that the judge would have allowed the expert to testify on factors that influence identification and memory.

The court declined to adopt "a presumption of admissibility" of expert testimony in eyewitness identification cases, citing concern that doing so would all but eliminate circuit court discretion. "However, we encourage circuit court judges to carefully consider, in each case, whether the admissibility of the eyewitness expert testimony would be helpful to the trier of fact." 2006 WI 9, ¶43.

In State v. Hibl, 2006 WI 52, ¶31, 290 Wis.2d 595, 714 N.W.2d 194, the Wisconsin Supreme Court recognized that an identification derived from an accidental confrontation resulting in a witness's spontaneous identification lacking law enforcement involvement does not implicate the defendant's due process rights. Although most such identifications will be for the jury to assess, the circuit court still has a limited gate-keeping function. It may exclude such evidence under § 904.03 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The court elaborated on the circuit court's obligation:

> In exercising its gate-keeping function, the court should consider whether cross-examination or a jury instruction will fairly protect the defendant from the unreliability of the identification. . . We urge circuit courts, with assistance from the litigants before them, to take into consideration the evolving body of law on eyewitness identification. Any test for reliability and suggestiveness in the eyewitness identification context should accommodate this still-evolving jurisprudence, along with the developing scientific research that forms some of its underpinnings.
> 2006 WI 52, &54.

Jury Instructions on Eyewitness Identification

For many years, the most-cited eyewitness identification instruction was the "Telfaire" instruction. It takes its name from the case in which it was offered as a model for use in the District of Columbia, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). The text of the complete Telfaire instruction can be found at 469 F.2d 552 (D.C. Cir. 1972), at 558 (Appendix). The Committee concluded that including a long list of factors like that in the Telfaire model was not an effective approach. The jury should be told how to evaluate those factors in light of the circumstances in the particular case. This, in the Committee's judgment, is more effectively done by advocacy by the lawyers than by a listing of factors by the court.

The Committee specifically rejected language in the Telfaire instruction and in other models that advises the jury that they must find the defendant not guilty if there is a reasonable doubt about the accuracy of the eyewitness identification. The Committee concluded that this statement goes too far: there may be

sufficient evidence in addition to the identification that could overcome weakness in the identification and satisfy the "beyond a reasonable doubt" standard.

The American Bar Association Criminal Justice Section completed an extensive review of eyewitness identification procedures in 2004, including a review of jury instructions. That study concluded that the Telfaire instruction "omits many important factors and can be misleading, for example, by suggesting witness confidence is a good predictor of eyewitness accuracy when the research shows otherwise." American Bar Association Statement Of Best Practices For Promoting The Accuracy Of Eyewitness Identification Procedures Dated August, 2004. [Available on the ABA website: www.abanet.org/leadership/2004/ annual/111c.doc.] The report identified a modified instruction based on Telfaire and the instruction provided in People v. Wright, 43 Cal. 3d 399 (1987), as having been recognized as better approaches.

The Kansas Supreme Court has ordered trial judges to stop using jury instructions that told jurors they could consider how certain the witness was in evaluating an identification. The court concluded that "witness certainty" is a poor indicator of the reliability of an identification. Mitchell v. Kansas, No. 99,163, May 11, 2012.

On July 19, 2012, the New Jersey Supreme Court, by rule, approved new jury instructions on eyewitness identification, use of which will be required after Sept. 4, 2012. There are actually three instructions B one for in-court IDs, one for out-of-court IDs, and one for in- and out-of-court IDs. They are based on State v. Henderson, 208 N.J. 208 (2011), which directed that new instructions be prepared that focus on various factors recognized by research.

Cross-racial Identifications

The Committee considered adding something to the instruction to address cross-racial identifications but decided that a generally applicable statement could not be drafted. The propriety of an instruction on this factor, and any other relating to influences on the identification process, depends on there being an evidentiary basis for the existence of the factor and for the effect it is accorded. The latter may be satisfied by expert testimony or a recognition by appellate courts. Some courts have recognized that special considerations apply to cross-racial identifications. For example, the New Jersey Supreme Court has directed trial courts to address the issue. See, State v. Cromedy, 727 A.2d 457 (N.J. 1999). Other courts have held that a special instruction on cross-racial identification is not required. See, for example, Smith v. State, 857 A.2d 1198 (Md. App. 2004), which includes an extensive discussion of the issue and references to many relevant resources. The Wisconsin Supreme Court has not required a special instruction and has referred to the issue only indirectly: ". . . [I]n this case, the usual dangers inherent in eyewitness identification may have been exacerbated because this was a cross-race identification." State v. McMorris, 213 Wis.2d 156, 170, 570 N.W.2d 384 (1997). A footnote to the quoted material cited articles discussing cross-race identification. 213 Wis.2d 156, 170, at footnote 9. While some model instructions reviewed by the Committee refer to "common knowledge" or to what "studies show" in describing a factor's effect on the identification process, the Committee concluded that those were not sufficient bases on which to base an instruction to the jury on the cross-racial issue or any other specified factor